minor repairs to it which cost him $6,000. He produced no other evidence to support this assertion. The plaintiff's evidence was that when she first saw the house it had zinc roof and plank walls and that apart from minor repairs the structure remained the same. The defendant has lived in the house since 1962. Since 1965, that is for more than 11 years now, he has not paid any ground rent or assessment. This works out at a total of more than $3,500. I do not think the house itself together with minor repairs would have cost the defendant or his father anything more than that. I believe the ends of justice will be met if he is not required to pay arrears of ground rent and assessment and not awarded any compensation, but I think he must be given a bit of time to give up vacant possession.

In the result I would allow this appeal, setting aside the order of the court below and restoring the judgment of the learned President, Sessions Court as regards delivery of vacant possession by the defendant but there will be no order for damages for unlawful occupation. The defendant must quit and deliver vacant possession on or before February 28, 1977. He must also pay the costs of this appeal and the costs in the courts below.

Ali and **Wan Suleiman F.JJ.** concurred.

Appeal allowed.

Solicitors: *D.P. Vijendran & Zulkifli; R.R. Chelliah Bros.*

SHANMUGAM v. PITCHAMANY & ANOR.

[O.C.J. (Hashim Yeop A. Sani J.) January 23, 1976]
[Ipoh — Divorce Petition No. 13 of 1972]

Family law — Divorce — Adultery — Quantum of proof — Custody of children.

Practice and Procedure — Part-heard case — Death of judge who heard the case — Whether case can be continued before different judge.

In this case the divorce petition had been heard by the late Mr. Justice Sharma, and had been adjourned. When the case came up for continuation, counsel for the parties applied for the case to be continued and not heard *de novo*. The application was agreed to subject to full liberty to the parties to recall and re-examine any witness as they may wish to do. The ground on which the divorce petition was based in this case was adultery.

Held: (1) the allegation of adultery has to be proved to the satisfaction of the court beyond reasonable doubt. In this case the evidence adduced by the petitioner had sufficiently established by necessary inference that adultery must have been committed and therefore a decree nisi should be granted;

(2) in the circumstances of this case custody of all the children except the eldest aged 15, should be given to the petitioner, with unrestricted right of access by the respondent;

(3) as it appeared that the eldest child had been with the respondent all along, the custody of the eldest child should continue to remain with the respondent.

Cases referred to:—

(1) *In Re Application of British Reinforced Concrete Engineering Co. Limited* 45 T.L.R. 186.

(2) *Coleshill* v. *Manchester Corporation* 44 T.L.R. 258; [1928] 1 K.B. 776, 786.

(3) *Bastable* v. *Bastable* [1968] 1 W.L.R. 1684, 1687 C.A.

(4) *Farnham* v. *Farnham* (1925) 133 L.T. 320.

DIVORCE PETITION.

S. Jegathesan for the petitioner.

S.A. Lingam for the respondent and the co-respondent.

Hashim Yeop A. Sani J.: This divorce petition was first heard by the late Justice N. Sharma on November 20, 1973 and continued on April 11, 1974. During the two days of hearing five witnesses were heard, four of whom were on behalf of the petitioner and the last witness heard was the respondent. The only witness left unheard when this case came up for continuation on December 9, 1975, was the co-respondent. When the case came up for continuation before me on December 9, 1975, both counsel for the petitioner and counsel for the respondent and co-respondent applied to the court that the case be continued and not heard *de novo* on the grounds that all the witnesses except one had already been heard. I agreed to the application subject to full liberty to both counsel to recall and to re-examine any witness as they might wish and to resubmit on any point. I bore in mind the case *In Re Application of British Reinforced Concrete Engineering Co., Limited*(1) where it was held that where during proceedings without a jury, after some of the witnesses have been called, the presiding judge dies, another judge, if there is no conflict of evidence, may at the request of the parties preside at the continuation of the hearing, after reading the shorthand notes of the evidence, and need not have the witnesses recalled. In that case Mr. Justice MacKinnon adopted the same procedure. The dictum of Lord Justice Scrutton in *Coleshill* v. *Manchester Corporation*(2) was also explained in that case as a dictum directed to a case heard before a judge and jury where there was a conflict of evidence. In the latter case Scrutton L.J. commented on the procedure adopted in a case which had been partly heard before Mr. Justice Fraser at the time of that judge's death: "I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in court in the course of the trial before the jury and another judge, it not being a case of evidence being taken on commission or before an examiner."

During the continued hearing on December 9 and 10, 1975, PW1 (the petitioner), PW3, PW4, and RW1 (the respondent) were recalled and re-examined before the co-respondent was called to give evidence.

The undisputed facts are that the petitioner and the respondent were married on May 22, 1959, under the Civil Marriage Ordinance, 1952. The petitioner was then 18 years old and the respondent was 16 years old. At the time of the hearing the petitioner was the Headmaster of a Tamil School, and the respondent was a housewife. Their matrimonial home was No. 349, Jalan Aman Shah, Selama, Perak. There were 5 children from the marriage aged 15, 14, 12, 11 and 9 years respectively. At the time of the incident on December 6, 1971 (which precipitated the present petition) the co-respondent and another person (PW4) were lodgers at the matrimonial home.

The story of the petitioner can be summarised briefly as follows. On December 6, 1971, at about

7.00 p.m. the petitioner returned home. What happened was that according to the petitioner on reaching the house he saw the co-respondent's bicycle outside in front of the house and he found his 3 children in the lounge of the house, 2 of them playing in two baskets and 1 reading a book in between the baskets. The other 2 children were at that time away in their grandmother's house somewhere else. The petitioner then asked one of the children where the respondent was and was told that she was at the back. The petitioner became suspicious because the rear portion of the house was not lighted and proceeded first into the bedroom and when he found the respondent was not there he proceeded to the kitchen. As he approached the kitchen he saw the respondent coming out of the kitchen and appeared to him to be tying up her sarong in a suspicious manner. According to him the respondent then put her hand on his shoulder to prevent him from going to the kitchen. As he was proceeding away from the kitchen he remembered that he saw the co-respondent's bicycle outside the house and he went back towards the kitchen whereupon he saw the co-respondent coming out of the kitchen wearing only a towel going towards the bathroom. The petitioner emphasized that there was no light in the kitchen although there was a gas lamp in the main building. The petitioner said he became suspicious and suspected that the respondent and co-respondent must have had sexual intercourse in the kitchen and asked the respondent where her panties were and the respondent shouted why he behaved towards her like a stranger. The petitioner then asked the respondent to bring a lamp. The respondent brought a lamp but purposely dropped it breaking the chimney. After that the petitioner picked up the lamp and asked the respondent to light it and after that he went to the kitchen with the lamp and found the respondent's panties under the window on the floor. The window was closed. He asked her why were her panties on the floor. She replied she wanted to ease herself. In the meantime, the co-respondent finished his bath and went back to his room. The petitioner questioned the respondent further. She denied committing adultery but later admitted that the co-respondent had called her to kiss him. According to the petitioner the respondent admitted he had kissed her but had done nothing else. The co-respondent came out of his room and after inviting the petitioner to go to the cinema, left the house. The following day, *i.e.* on December 7, 1971, the co-respondent left the house for good. On the same day the petitioner also took the respondent back to her father's house. On December 9, 1971, the co-respondent came to the petitioner's house and admitted the adultery. Letter (P2) written by the co-respondent was also produced by the petitioner. On December 10, 1971, the co-respondent again came to the petitioner's house and at the same time PW2, PW3 and PW4 were also present in the house. On the same day the respondent was also brought back by her father to the house and it was only then, according to the petitioner, that he informed his father-in-law about the behaviour of the respondent. According to the petitioner on December 10, 1971 both the co-respondent and the respondent admitted the adultery. Co-respondent offered to take the respondent and the respondent asked for forgiveness. On December 12, 1971, the petitioner received another letter (P3) from the co-respondent. On December 10, 1971, the respondent went away with her father but she returned on January 2, 1972, and stayed in that house until May 15, 1973. However, the petitioner went to stay in his school from January 2, 1972 until the respondent left his house again on May 15, 1973.

PW2 did not offer any evidence pertaining to the adultery except to corroborate the petitioner as to what happened on December 10, 1971 in petitioner's house. He said the co-respondent came and the petitioner asked him to tell the truth whereupon the co-respondent replied "an offence has been committed" and further said to the respondent "I am prepared to take you as we promised each other. You can even come now with me." After that PW2 went home.

PW3 first testified that he saw the petitioner on December 7, 1971 and saw that the petitioner appeared very depressed. He asked why and the petitioner replied that his wife was unfaithful. PW3 also testified as to what happened on December 10, 1971. According to him the petitioner told the respondent's father that he had to call the co-respondent to be satisfied about the truth. When the co-respondent arrived at the house the petitioner asked the respondent's father who disbelieved the petitioner to question the co-respondent directly. Again this witness said that the co-respondent stated that he was prepared to live with the respondent.

PW4, another lodger in the petitioner's house when recalled during the continued hearing testified as to what he saw on three occasions prior to December 6, 1971. These are as follows. The first occasion was on a certain date which he could not remember when he saw respondent and co-respondent talking in the kitchen and co-respondent was holding the respondent's hands which he thought was improper because respondent was somebody else's wife. The second incident was when he had a headache and had to stop work in the school to look for ointment in the house. He went into the co-respondent's room to look for the ointment and he saw the bed in a disorderly manner with a sarong partly on the bed and partly on the floor with what appeared to him to be semen stains which was recent and still wet. He said he knew it was semen as it smelled like semen and was sticky. The last occasion he referred to was on the night of his engagement when he returned to the house after the ceremony. The petitioner and co-respondent's elder brother were still in town then. In the house he saw co-respondent in the respondent's room. The door was open. As he entered he heard sounds of bed creaking for about 15 minutes. Then the petitioner returned. PW4 said he heard the sound of the petitioner's car and co-respondent rushed out of the respondent's bedroom. So much for the petitioner's story.

The respondent's story is that on the night of December 6, 1971, while she was reading a book in the hall the co-respondent called from the bathroom to ask where the pail was. She remembered that she

had put the pail in the kitchen earlier and went to the kitchen to take the pail to the co-respondent. The co-respondent also came into the kitchen and as she was coming out of the kitchen the petitioner arrived. She denied that there was any adulterous association between her and the co-respondent. In fact she said the co-respondent was a lodger in the house against her wishes. She had to cook for the lodgers as well as for the petitioner's "gang" (meaning PW2, PW3, and PW4) whenever they wanted food. She received no money as rents from the lodgers, all the rents being collected by the petitioner himself. Later in her evidence she however admitted that she did take some money from the co-respondent when she was short of money. She also said that the trouble between her and the petitioner was in fact in the religious differences they have had as she is a Christian while he is a Hindu and the petitioner wanted all the children to be Hindus.

Likewise the story of the co-respondent is a denial of any adulterous association. He admitted having written the two letters (P2 and P3) but said both were written under duress as dictated by the petitioner. There was however discrepancy in the testimonies of the respondent and the co-respondent on the question of the pail in the kitchen. The respondent also denied that she ever asked for forgiveness to the petitioner. The co-respondent also denied that he ever admitted anything in the presence of the petitioner or the petitioner's witnesses.

It is well established in law that an allegation of this nature must be proved to the satisfaction of the court beyond reasonable doubt. In Rayden on Divorce, 12th Edition, page 193, it is said: "The burden of proof is throughout on the person alleging adultery, there being a presumption of innocence."

In *Bastable* v. *Bastable*[3] Willmer L.J. said:

"True, it is not a criminal offence; it is a matrimonial offence. It is for the husband petitioner to satisfy the court that the offence has been committed. Whatever the popular view may be, it remains true to say that in the eyes of the law the commission of adultery is a serious matrimonial offence. It follows, in my view, that a high standard of proof is required in order to satisfy the court that the offence has been committed."

In *Rayden* on Divorce, 12th Edition, at page 196, it is however said: —

"To succeed on such an issue it is not necessary to prove the direct fact, or even an act of adultery in time and place, or even necessarily the name of the person with whom the respondent is alleged to have committed adultery. It is rare that parties are surprised in the direct act of adultery, and such evidence, because of its unusual nature, used to be looked at carefully, and still would be when the adultery is in dispute. In nearly every case, where there is no confession, the fact is inferred from circumstances which lead to it, by fair inference, as a necessary conclusion. The court must be satisfied that there was something more than opportunity before it will find that adultery has been committed; evidence of an inclination or passion is needed in addition.

On the question of corroboration, it is too well established that corroboration, where required, must be independent testimony which affects the accused by connecting him or tending to connect him with the offence. Evidence of mere opportunity is not sufficient to constitute corroboration, since opportunity may or may not be used. The evidence adduced must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed. Where the evidence is entirely circumstantial as in this particular case, the court should not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation. (See *Tolstoy* on the Law and Practice of Divorce, 4th Edition at page 29). As Lord Merrivale P. said in *Farnham* v. *Farnham*[4] "The inference of adultery arises when there is proof of the disposition of parties to commit adultery, together with the opportunity to commit it."

As is usual in cases like this, parties present conflicting versions of what actually happened. In this case what the witnesses on behalf of the petitioner have sought to establish was the existence of an adulterous association between the respondent and the co-respondent for a period of time up to and including December 6, 1971. None of the witnesses on behalf of the petitioner could identify the approximate date of the commencement of such association. Even the most specific of the witnesses (PW4) could not remember the dates of the three incidents which he related as incidents he witnessed himself. On the three incidents on only one could he relate to some particular date, *i.e.* the date of his engagement. Specific dates were however given as to circumstances after December 6, 1971 by the petitioner and the other two witnesses, PW2 and PW3. Specific date was given with regard to the meeting between all concerned at the petitioner's house in the evening of December 10, 1971 when the respondent was said to have asked for forgiveness and the co-respondent was said to have offered to take respondent with him.

Both the respondent and the co-respondent however denied the version of the petitioner. It appears that it is their contention that all the witnesses brought by the petitioner should not be believed by the court, because they belonged to the same group (respondent said "gang") and were therefore not independent witnesses.

Before we go any further it is important that we look at the contents of the letters (P2 and P3) which were admitted by the co-respondent to have been written by him but written under duress. Letter (P2), translation (P2T) to my mind is nothing more than praises for the "sterling qualities" of the petitioner. In that letter the co-respondent referred to himself as a "walking corpse" and signed the letter as "a sinner". In the letter (P3) which is a much longer letter than P2 the contents referred firstly to the "entanglement" between the petitioner, the respondent and the co-respondent (the writer). The letter is long winded but the gist (as far as I can gather) seems to be that the writer referred to an "oath" taken by all three of them (no evidence on this) and their relationship was reorganised pursuant to the oath whereby the respondent now became the "wife" of the co-respondent and "sister" of the petitioner. The co-respondent also referred to "the sinful act that we had undergone" and the petitioner to take care of the respondent until the respondent is taken away by him. P3 is also signed as "Offender" followed by the name of the co-respondent.

In my view assessment of the two letters (P2 and P3) is material in the determination of the truth or otherwise of the version of the respondent and the co-respondent. According to the co-respondent both the letters (P2 and P3) were written by him under duress. The contents of the two letters were he said as dictated to him by the petitioner in a shop in Bagan Serai. There is however a number of inconsistencies in this. Firstly, the letters (P2 and P3) were written on different types of paper and this can clearly be seen. Secondly, it would appear also to be written with different ink. Thirdly, if both were written at the same time there is however evidence that letter (P3) was posted in an envelope bearing postmark "Bagan Serai" whereas there is evidence that P2 was delivered in person to petitioner by PW3. Finally, the content of P3 itself would indicate that it was from a person who was concerned with the happiness of the respondent ("Say nothing to her which might bring tears from her eyes.") whereas it was already established that by December 10, 1971, the date of the letter, petitioner had already taken the respondent back to her father's house and there was certainly a feeling of hostility by the petitioner towards the respondent. Counsel for the petitioner went further by suggesting that the co-respondent who on his own testimony admitted to be fond of quotations from learned writers must have written these letters himself.

It is the contention of the respondent and the co-respondent that PW2, PW3 and PW4 are not witnesses of truth. However, apart from the allegation by the respondent that they belong to one "gang" with the petitioner I find nothing in their evidence which could entitle me to doubt or disbelieve them. The evidence of PW4 (who was a fellow lodger with the co-respondent) discloses nothing on which I can base any reasonable suspicion that he was not an independent witness.

It is true that none of the evidence adduced on behalf of the petitioner was direct evidence of adultery between the respondent and the co-respondent but it is also true that in a case of this nature it is indeed rare that the parties committing adultery are caught in the act and therefore in almost all cases the court will have to depend on circumstantial evidence from which it can safely infer that adultery must have been committed. From the petitioner's own evidence it would be fair to conclude that he was free from any feeling of suspicion towards the respondent until December 6, 1971. But it appears that his suspicion was aroused because of the circumstances in which he found the respondent with the co-respondent that night. I agree that on the petitioner's testimony alone no conclusion can safely be arrived at that an adulterous association existed at that time between the respondent and the co-respondent. But when the whole evidence adduced on behalf of the petitioner and the other witnesses especially PW4 is considered the picture changes. It is the contention of the counsel for the respondent and the co-respondent that the evidence on the incriminating circumstances adduced by PW4 were adduced only as an afterthought for nothing of that kind was said by this witness in the earlier hearing before the late Mr. Justice N. Sharma. But the reply by this witness, I think, clears the position in that he said he did not say all this before because he was not asked by his counsel then (who was a different counsel from the counsel for the petitioner at present). PW4 is a simple person not really literate and probably never came to give evidence in court before. I do not think it is fair to expect him to narrate his experience pertaining to any particular matter without being asked by his counsel first. For this reason I am not entitled in my view to conclude that PW4 has concocted the evidence.

In this case the co-respondent was a lodger staying in the same house with the respondent. The opportunity to commit adultery if the parties were so inclined was always present whenever the petitioner was not around. In my view the whole evidence adduced on behalf of the petitioner has sufficiently established by necessary inference that adultery must have been committed.

For these reasons I order that decree nisi be granted to be made absolute in three months from the date hereof. On the question of custody it has been disclosed that all the children of the marriage except one child, the eldest, aged 15, are already with the petitioner. It is established that the petitioner is the headmaster of a school earning a substantial monthly salary and who has also testified that he has taken various steps towards the welfare of the children including the taking of education insurance. It is however disclosed in her own evidence that the respondent is unemployed and that she is living with her father who according to her is also unemployed. I therefore order that the custody of the children already with the petitioner shall remain with the petitioner with unrestricted right of access by the respondent. As it appears that the eldest child has been with the respondent all along, the custody of the eldest child shall continue to remain with the respondent. Either party shall be at liberty to apply to vary the order as to custody. Costs of this petition shall be borne by the respondent and the co-respondent.

Order accordingly.

Solicitors: *Cheang Lee & Ong; S.A. Lingam.*

EMPLOYEES PROVIDENT FUND BOARD v. EMPLOYEES PROVIDENT FUND BOARD STAFF UNION

[O.C.J. (Chang Min Tat J.) March 5, 1976]
[Kuala Lumpur — Originating Motion No. 59 of 1975]

Practice and Procedure — Application for certiorari to quash decision of Industrial Court — Whether Industrial Court must be served — Whether Attorney-General must be served — Industrial Relations Act, 1967, ss. 21(2) and 53A(1).

In this application for *certiorari* to quash the decision of the Industrial Court, a preliminary point was made that the Attorney-General and the Industrial Court must be served.

Held: (1) in the circumstances of this case the Attorney-General need not be served;

(2) the Industrial Court should be served with a copy of the application.